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No. 97-16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,
Petitioner,

v.

SIERRA CLUB, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: December 16, 1997

QUESTION PRESENTED

Amici curiae address the following question only:

Is there a justiciable controversy on Respondents' facial challenge to a long-term federal land use plan (the Forest Plan for the Wayne National Forest), where that Plan does not provide authority to engage in any ground-disturbing activity?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief, in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

its resources to promoting civil justice reform. To that end, WLF has appeared before this Court as well as other federal and state courts to support rules limiting entry into federal court to those who have suffered, or imminently will suffer, a distinct injury at the hands of the defendant. *See, e.g., Lujan v. Defenders of Wildlife ["Defenders"]*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Fed'n ["NWF"]*, 497 U.S. 871 (1990).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that the federal courts not become -- through underenforcement of rules regarding standing and ripeness -- some sort of super administrative agency, with the power to second-guess each and every decision made by the Executive Branch of government. The judiciary is, of course, limited by Article III of the Constitution to resolving cases and controversies, and plaintiffs cannot be said to have raised a case or controversy unless they can demonstrate that the action of which they complain has inflicted on them a distinct injury. Because *amici* have no direct interest in the underlying merits of Respondents' claims, *amici* believe they bring to the Court a point of view distinct from that of any party.

Amici submit this brief in support of Petitioner with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Petitioner's brief.

In brief, Respondents Sierra Club and Citizens Council on Conservation and Environmental Control (referred to collectively as "Sierra Club") are challenging the adequacy of a long-term management plan (the "Wayne Forest Plan" or the "Plan") adopted in 1988 by the United States Forest Service in connection with the Wayne National Forest in Ohio; they also challenge the final Environmental Impact Statement ("EIS") issued in conjunction with the Plan.

The National Forest Management Act of 1976 (NFMA) creates a duty on the part of the Forest Service to adopt such a long-term management plan (known as a "land and resource management plan" or "LRMP") for each national forest or group of national forests in the United States. 16 U.S.C. § 1604. The NFMA makes clear that LRMPs are long-term planning documents: it provides that such plans are to remain in effect for 10 to 15 years, after which they are replaced by revised plans. 16 U.S.C. § 1604(f)(5). By regulation and pursuant to the National Environmental Policy Act (NEPA), the Forest Service routinely prepares an EIS in conjunction with each LRMP.

In the 20 years since adoption of the NFMA, the Forest Service generally has not included in LRMPs authority for anyone to engage in ground-disturbing activity (such as timber cutting). *See* Brief of Federal Respondents in Opposition to Certiorari Petition ("U.S. Br.") 3-4. Rather, no such activity is permitted to go forward until the Forest Service has determined whether the activity is

consistent with the LRMP and also has assessed the likely environment effects of the activity. *Id.* at 4.

Following several years of preparation, the Wayne Forest Plan was approved by the Forest Service's Regional Forester in January 1988. The Sierra Club and the Citizens Council on Conservation and Environmental Control filed administrative appeals, contending that the Plan provided for excessive amounts of lumbering (and, in particular, of lumbering employing "even-aged management" techniques) within the Wayne National Forest. The Chief of the Forest Service denied those appeals and affirmed the Wayne Forest Plan on November 14, 1990 and January 14, 1992. Pet. App. 66a-77a; 78a-80a.

In January 1992, the Sierra Club filed suit under the Administrative Procedure Act in U.S. District Court for the Southern District of Ohio, challenging the propriety of the Wayne Forest Plan and its accompanying final EIS. The Sierra Club alleged that the Plan violated the NFMA and NEPA in several respects. Pet. App. 133a-145a. It alleged a right to review under 5 U.S.C. § 704, which provides for judicial review of "final agency action for which there is no other adequate remedy." Named as defendants in their official capacities only were the Secretary of Agriculture and several Forestry Service officials. Petitioner Ohio Forestry Association thereafter intervened in the suit on the side of the defendants.

The district court granted summary judgment to the defendants on March 11, 1994. Pet. App. 10a-48a. In doing so, the district court reached the merits of the Sierra Club's claims without any discussion of the suit's justiciability, an issue not raised by any defendant.

Following the Sierra Club's appeal to the U.S. Court of Appeals for the Sixth Circuit, the appellees sought affirmance on the ground, *inter alia,* that the suit was not justiciable. The Sixth Circuit disagreed, finding both that the Sierra Club had standing to filing suit and that the case was ripe for review. *Id.* 3a-4a. Addressing the merits, the Sixth Circuit concluded that the Wayne Forest Plan was adopted arbitrarily and capriciously in that it failed to comply with the NFMA. *Id.* at 8a. The Sixth Circuit reversed the district court's grant of summary of judgment and remanded the case to the district court "for further proceedings consistent with this opinion." *Id.*

This Court granted the Ohio Forestry Association's petition for a writ of certiorari on October 20, 1997.[2] The petition raises two separate issues -- whether the Sierra Club's claims are justiciable, and whether the Sixth Circuit erred in its merits rulings favoring the Sierra Club. This brief addresses only the first of those two issues.

SUMMARY OF ARGUMENT

The Court should not reach the underlying merits of Respondents' claims because the case quite clearly is not justiciable in the federal courts. Their claims are not ripe for review, and they lack standing to raise those claims.

Respondents have made none of the three showings that a plaintiff must demonstrate in order to establish standing in federal court. They have not suffered any "injury in

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[2] Although the Federal Respondents opposed granting the writ, they made clear in their opposition brief that they disagreed with the Sixth Circuit decision, with respect both to justiciability and to the legality of the Wayne Forest Plan. U.S. Br. 12.

fact," because any possible injury is not imminent, and will not come about unless and until the Forest Service makes additional site-specific determinations that are not pre-ordained by the Wayne Forest Plan. While Respondents complain of the loss of procedural rights, such loss has never been deemed sufficient to establish "injury in fact" unless the plaintiff can demonstrate that the loss is likely to impair some "separate concrete interest" (s)he possesses. Second, any injury suffered by Respondents is not fairly traceable to adoption of the Wayne Forest Plan; any lumbering that has taken place at the Wayne National Forest cannot be said to have been the inevitable result of adoption of the Plan. Third, any injury suffered by Respondents is unlikely to be redressed by an order invalidating the Plan, because the Forest Service possesses authority to proceed with timber operations that is independent of the Plan.

Respondents' claims also are not ripe for review. *Amici* note in particular that the decision-making process with respect to whether timber operations should proceed at any specific site in the Wayne National Forest is not made complete by virtue of adoption of the Plan. When a decision is made to go ahead with timbering at a particular location, any challenge to that decision would be ripe, but that decision would not make the Plan itself any more ripe.

ARGUMENT

I. RESPONDENTS LACK ARTICLE III STANDING TO CHALLENGE EITHER THE WAYNE FOREST PLAN OR ITS ACCOMPANYING FINAL EIS

While the federal government is empowered under the United States Constitution to resolve many types of disputes, this Court has repeatedly made clear that only a

portion of those disputes are properly resolvable within the judiciary. One well-developed doctrine that "serves to identify those disputes which are appropriately resolved through the judicial process" is the doctrine of standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Because the Sierra Club has failed to demonstrate any of the three elements necessary to establish its standing, the federal judiciary lacks jurisdiction to hear Respondents' claims.

The Court recently summarized the three elements of standing as follows:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, *see [Allen v. Wright*, 468 U.S. 737,] 756 [1984]; *Worth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741 n.16 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore, supra*, 495 U.S. at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95 (1983). Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision." *Id.* at 38, 43.

Defenders, 504 U.S. at 560-61.

Amici will address, in turn, the Sierra Club's deficiencies with respect to each of those three elements.

A. Any Injury to Respondents Based on Adoption of the Wayne Forest Plan Is Conjectural and Not Imminent and Thus Does Not Constitute "Injury in Fact"

The Sierra Club alleges two deficiencies in the Wayne Forest Plan: (1) too large a portion of the Wayne National Forest was made available for timbering; and (2) too much of the timber harvesting was to consist of clearcutting. Neither the Sierra Club nor its members can be said to have been subjected to "imminent" injury as a result of either alleged deficiency.

There is simply nothing in the Wayne Forest Plan that authorizes *any* type of ground-disturbing activity within the Wayne National Forest. Indeed, in rejecting appeals from approval of the Wayne Forest Plan, the Forest Service emphasized precisely that point: no timber sales would be authorized until after completion of site-specific inquiries in which interested members of the public would be permitted to participate. Pet. App. 70a, 75a-76a, 100a. Given that the Wayne Forest Plan pre-ordains no specific logging operations, the Plan cannot be said to threaten imminent injury to Respondents' ability to view undisturbed lands in any specific portion of the Wayne National Forest.

The Sierra Club argues that its faces imminent injury because its ability to challenge programmatic determinations underlying the Wayne Forest Plan will be lost unless it is granted standing to challenge the Plan in court. Sierra Club Brief in Opposition to Petition ("Opp. Br.") 15-16. The Sierra Club asserts:

> [I]f the agency action could only be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.

Id. (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (1992)). In its decision below, the Sixth Circuit also cited *Mumma* in support of the same argument. Pet. App. 4a.

The fallacy in the Sierra Club's and the Sixth Circuit's argument is that the Wayne Forest Plan does *not* "pre-determine[] the future." While future logging in the Wayne National Forest is more likely than if the Wayne Forest Plan had included no provision for logging, the fact remains that logging at any specific site in the forest must be deemed "conjectural" because no such logging will be permitted until the Forest Service conducts a site-specific review regarding the propriety of logging at that site.[3] Indeed, experience bears out the Forest Service's claim that the Plan does not pre-ordain that logging will take place at any specific site: on two occasions following adoption of the Plan, the Sierra Club has persuaded the Forest Service not to permit proposed clearcutting at specific sites within the Wayne National Forest. U.S. Br. 16 n.11. Moreover, the level of lumbering activity in the Wayne National Forest since adoption of the Plan in 1988 has been far lower than the projected level. *Id.* at 16-17.

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[3] And, of course, in any subsequent court challenge to a site-specific decision that permitted lumbering and relied on determinations contained in the Wayne Forest Plan in doing so, the plaintiff would be free to argue that those determinations were invalid.

Respondents may worry that, as a result of adoption of the Plan, they have fewer weapons in their arsenal with which to contest lumbering at any and all locations within the Wayne National Forest. But such psychic injuries have never been deemed to constitute the "injury in fact" necessary to establish standing. *See, e.g., Allen v. Wright,* 468 U.S. at 754-56.

Nor may the Sierra Club meet the "injury in fact" requirement by alleging some sort of procedural injury. The argument appears to be that the NFMA and NEPA are intended to safeguard the rights of private citizens to view National Forests and that citizens suffer a cognizable injury when those safeguards are eliminated. *See, e.g.*, Opp. Br. 17-19. While the Court has recognized that "'procedural rights' are special" (*Defenders,* 504 U.S. at 572 n.7), it has made clear that the loss of one's procedural rights is never sufficient by itself to demonstrate injury in fact. Rather, injury in fact is absent unless the plaintiff can demonstrate that the procedural injury is likely to impair some "separate concrete interest" (s)he possesses. *Id.* at 572. As explained above, the Sierra Club cannot make that demonstration in this case because there is no way to predetermine (based on the Plan) where, within the Wayne National Forest, timber sales will be permitted and thus whether any of its members might suffer injury to their aesthetic interests.

Amici commend to the Court a recent opinion of the United States Court of Appeals for the District of Columbia Circuit that considered at length the "injury in fact" showing required of a plaintiff claiming standing under NEPA to challenge a government agency's failure to prepare an adequate EIS. In *Florida Audubon Society v. Bentsen,* 94 F.3d 658 (D.C. Cir. 1996)(*en banc*), the D.C.

Circuit addressed a claim that the Treasury Department violated NEPA by failing to prepare an EIS in connection with a rule granting tax credits for use of ETBE, a fuel additive derived from ethanol. The plaintiffs complained that the rule would stimulate increased production of corn and sugar (crops necessary in producing ETBE) and that the environmental consequences of that increased production would result in injury to their aesthetic interests.

The D.C. Circuit recognized that the plaintiffs' aesthetic interests in viewing the wilderness areas they frequented could, in a case in which those interests were truly threatened, serve as the basis for a finding that the plaintiffs had suffered "injury in fact." The court nonetheless held that the plaintiffs -- despite their claims that the Treasury Department had ignored procedural protections afforded them under NEPA -- had failed to demonstrate the requisite "injury in fact" because there was insufficient evidence that the alleged procedural violations would cause environmental damage at any location regularly viewed by any plaintiff. *Id.* at 666-68. The D.C. Circuit concluded:

> Unless an EIS plaintiff at least shows, through competent and sufficient evidence, that the omission of an EIS may cause a government actor to overlook a demonstrably increased risk of injury to a personal and particularized environmental interest of the plaintiff, *and* that there is a substantial probability that the government act allegedly implicating the EIS requirement will cause that demonstrably increased risk of injury, that plaintiff cannot have standing.

Id. at 672. Once it is recognized (as this Court did in *Defenders*) that a violation of one's procedural rights is insufficient by itself to establish "injury in fact," the rule

established by the D.C. Circuit makes eminent sense. As the D.C. Circuit explained:

> Not to require that a plaintiff show that its particularized injury resulted from the government action at issue would effectively void the particularized injury requirement. After all, any plaintiff may allege an injury to its own interests if that injury need not be caused by any act of the defendant.

Id. at 669.

The Sierra Club cannot make the showing required by *Florida Audubon*. The Wayne National Forest encompasses more than 200,000 acres in southern Ohio. Less than 1% of that acreage has been subjected to clearcutting since adoption of the Wayne Forest Plan in 1988. U.S. Br. 17. Based on that evidence, it cannot be said that *any* of the acreage within the Wayne National Forest had a "demonstrably" increased risk of being clearcut (or harvested in any other manner) as a result of the procedural violations alleged by Respondents, much less that the particular acreage frequented by Respondents' members faced such a risk.[4] Moreover, the Sierra Club has made no attempt to quantify the lumbering activity that would have occurred after 1988 had a proper EIS been prepared; in the absence of such evidence, one cannot begin to determine

[4] The affidavits recently filed by Sierra Club members in the district court do not show otherwise. To the extent that Respondents are asserting procedural injury, the critical issue (for purposes of determining standing) is not whether the affiants were affected by post-1988 lumbering in the Wayne National Forest, but whether the alleged procedural violations cause a demonstrably increased risk of injury.

the degree to which the alleged procedural deficiency demonstrably increased Respondents' risk of injury.

Assuming that at least one Sierra Club member had an aesthetic interest in viewing any specific portion of the Wayne National Forest that has been lumbered, or imminently will be lumbered, the Sierra Club can demonstrate injury in fact for purposes of challenging the site-specific approval granted by the Forest Service for lumbering at that site. But there can be no basis for bootstrapping such standing into standing to challenge the entire Wayne Forest Plan. As the Court emphasized in *NWF*, "Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administrative process only when, and to the extent that" a specific action has an "actual or "immediately threatened effect" on the plaintiff. *NWF*, 497 U.S. at 894.

B. Any Injury Suffered by Respondents Is Not "Fairly Traceable" to Adoption of the Wayne Forest Plan

In support of its allegation that it has been injured by adoption of the Wayne Forest Plan, the Sierra Club identifies as the source of its injury programmatic decisions contained in the Plan regarding both the quantity of lumbering and lumbering techniques to be undertaken. For many of the same reasons cited in the previous section, Respondents have not demonstrated the second of the three standing requirements because any injuries suffered by the Sierra Club and/or its members cannot be said to be "fairly traceable" to the Plan.

The Sierra Club's argument that it has met the "fairly traceable" requirement is based on a misreading of this Court's decision in *Bennett v. Spears*, 117 S. Ct. 1154 (1997). In *Bennett*, the U.S. Fish and Wildlife Service (F&WS) argued that the plaintiffs (a group ranch operators and irrigation districts) had failed to demonstrate that their alleged injury (an imminent decision by the Bureau of Reclamation to reduce water releases from an Oregon reservoir) was not "fairly traceable" to the F&WS's issuance of a Biological Opinion that continuation of past levels of water releases would threaten two species of fish with extinction. The Court rejected F&WS's argument, finding that (at least for purposes of defeating a motion to dismiss at the pleadings stage) the plaintiffs had adequately alleged that their injuries were fairly traceable to the F&WS's issuance of the Biological Opinion. *Bennett*, 117 S. Ct. at 1164-65.

The rationale underlying *Bennett*'s "fairly traceable" determination is unhelpful to Respondents. *Bennett* reasoned that even though the Biological Opinion itself did not injure the plaintiffs, the alleged injury was virtually inevitable once the Biological Opinion had been issued because the Opinion essentially "coerc[ed]" the Bureau of Reclamation into reducing water discharges from the reservoir. *Id.*[5] The record in this case does not demonstrate that lumbering at any specific site in the Wayne National Forest is the inevitable result of adoption of the Wayne Forest Plan. The evidence shows just the opposite: total

[5] For example, the Court noted that Bureau of Reclamation personnel could face criminal charges for failing to heed the Biological Opinion's recommendations, if that failure were deemed to constitute a violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* *Id.* at 1165.

lumbering in the Wayne National Forest since 1988 is far below levels projected in the Plan. U.S. Br. 16-17. Indeed, the Forest Service has decided to amend the Plan to bring its projections in line with what has happened in the Wayne National Forest since 1988 and what is likely to happen in the remaining years before a new Plan is put in place. Accordingly, the Plan cannot be said to have had any coercive effect on Forest Service personnel -- they clearly have not felt bound by the Plan to maintain any minimum level of lumbering in either the Wayne National Forest as a whole or at any specific site in the forest. In the absence of such coercive effect, *Bennett*'s discussion of traceability is unhelpful to Respondents.

C. Respondents' Alleged Injury Would Not Likely Be Redressed by the Remedy They Seek

The Sierra Club alleges that because the Wayne Forest Plan and its accompanying final EIS were adopted in violation of the NFMA and NEPA, their continued use should be enjoined. The Sierra Club's requested injunction against use of the Plan further demonstrates Respondents' lack of standing, because that relief would be unlikely to redress the injuries they allege (injury to their aesthetic interests brought on by continued lumbering at the Wayne National Forest).

As the Federal Respondents point out, lumbering has been a major activity in national forests ever since the national forest system was established, and federal law contemplates that such activity will continue even in the absence of a valid LRMP for a particular forest. U.S. Br. 19 (citing 16 U.S.C. § 1604(c)). Thus, were the Wayne Forest Plan ultimately held to be invalid, lumbering would continue in the Wayne National Forest pursuant to prior

management plans, and the Sierra Club's alleged injury would continue unabated.

Amici note that the Sierra Club seeks, as an additional remedy, an injunction against any further timber sales in the Wayne National Forest. Pet. App. 144a. But any such remedy is outside the scope of the statutes under which Respondents seek relief. As noted above, Congress contemplated, in adopting the NFMA, that lumbering would continue while the Forest Service went through the process of putting valid LRMPs in place. Accordingly, Congress could not have intended that deficiencies in preparing an LRMP should lead to cessation of lumbering activity that were previously permissible. Were the Wayne Forest Plan ultimately found to be deficient, the only permissible relief would be an injunction against lumbering authorized solely by the Plan. Since such relief would be unlikely to redress Respondents' alleged injuries, they lack standing to bring their claims.

II. RESPONDENTS' CLAIMS ARE NOT YET RIPE FOR REVIEW

Respondents' claims should be dismissed for the additional reason that they are not yet ripe for review.

The ripeness doctrine is designed to protect government agencies from premature judicial interference:

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determination unless these [remedies] arise in the context of a controversy "ripe" for judicial resolution. . . . [I]t is fair to say that its basic rationale is to prevent the

> courts, through avoidance of premature adjudication, from entangling themselves in abstract policy disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

Abbott Laboratories set out a detailed framework for analyzing ripeness issues. The two basic prongs of the *Abbott Laboratories* analysis address: (1) the "fitness" of the issue for judicial decision; and (2) the hardship to the parties that would result from deferring review. *Id.* The "fitness" prong in turn has three components: whether the issue presented is largely a legal one, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final. *Id.* at 149-152.

Each of these factors points strongly to a finding that this case is not ripe for review. *Amici* note that the Eleventh Circuit held that a LRMP for the Cherokee National Forest was not ripe for judicial review under circumstances virtually identical to those here. The Eleventh Circuit held that because no lumbering would occur in the Cherokee National Forest without a second stage of decisionmaking that would consider factors specific to the site at which lumbering was contemplated, ripeness was lacking because the alleged injuries were "not imminent enough for purposes of judicial decisionmaking." *Wilderness Society v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996). The Eleventh Circuit held that it was insufficient for ripeness purposes that a future injury was more likely due to

adoption of the LRMP, so long as the injury was not thereby rendered "imminent." *Id.*

For purposes of the ripeness issue, *amici* think it particularly clear that issuance of the Wayne Forest Plan did not constitute final agency action; we thus focus much of our discussion on that facet of the ripeness issue.[6] The Court has addressed the meaning of "final agency action" in several recent cases. The Court has identified the "core question" in final agency action cases as "whether the agency has completed its decisionmaking process, and whether the result of that process is one that directly affects the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

Both prongs of that "core question" indicate that the issuance of the Wayne Forest Plan did not constitute final agency action. First, because the Wayne Forest Plan is a long-range planning document which does not mandate any site-specific activities, it is much more properly classified as a first step in the decisionmaking process rather than as a completion of that process. The only "decision" involved in issuance of the Plan is a decision to set some general guidelines that have no binding effect in future proceedings. Second, issuance of the Wayne Forest Plan was simply not an event that "directly affect[ed] Respondents and others who wish to visit the Wayne National Forest. No lumbering operations began as a direct result of issu-

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[6] *Amici* note that if the Wayne Forest Plan does not constitute final agency action for purposes of ripeness analysis, then Respondents' claims also are not reviewable under the APA, which limits APA review to "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added).

ance of the Plan, and those who object to any site-specific lumbering plan are still entitled to voice their objections before any lumbering can begin at that site.

The facts of this case are highly analogous to those in *Franklin*, in which the Court determined that the challenged administrative action did not constitute "final agency action." In *Franklin*, the Secretary of Commerce had issued to the President her final report regarding the 1990 census. Respondent Massachusetts objected to the report on the ground that it employed an improper counting method, the result of which was to decrease the size of Massachusetts's delegation in the U.S. House of Representatives. The Secretary had given her report to the President, who was tasked with transmitting the report to Congress; but the President was entitled to make whatever changes he saw fit before passing the report along to Congress. The Court determined that the Secretary's report did not constitute "final agency action" because it was subject to later revision and "carrie[d] no direct consequences for the reapportionment." *Franklin*, 505 U.S. at 798. The Court determined the report to be nonfinal, even though it was the final action to be taken by the Department of Commerce with respect to the census.

So too with the Wayne Forest Plan. While it is true that the Plan was the Forest Service's final version of its long-range planning document for the Wayne National Forest, the Plan failed to make any final land-use determination with respect to *any* site within the forest. The Forest Service has subsequently felt free to override the Plan's guidelines when making specific land-use determinations, and it is in the process of amending the Plan to bring it into conformance with actual post-1988 practice within the Wayne National Forest. As in *Franklin*, the

Wayne Forest Plan "is more like a tentative recommendation than a final and binding determination." *Id.*

Similarly, in *Dalton v. Specter*, 511 U.S. 462, 470 (1994), the final report issued to the President by the Secretary of Defense and the Defense Base Closure and Realignment Commission was held not to constitute "final agency action" because the report's recommendations were not binding on the President. *See also, Bennett v. Spears*, 117 S. Ct. at 1168 (to be final, agency action must not only "mark the consummation of the agency's decision-making process" but must also "be one by which rights or obligations have been determined, or from which legal consequences will flow.")(citations omitted). In the absence of any evidence that any "legal consequences" have flowed from the Wayne Forest Plan with respect to *any* site in the forest, the Plan cannot be considered final agency action.

The Seventh Circuit arrived at a contrary view of LRMPs by focusing on temporal issues, rather than on whether LRMPs determine any legal rights or obligations. *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995). The Seventh Circuit cited *Defenders* for the proposition that a controversy should not be deemed unripe for judicial review simply because the plaintiff will not suffer injury for some time. *Marita*, 46 F.3d at 613 (citing *Defenders*, 504 U.S. at 562-64). The appeals court held that the plaintiffs' challenge to a LRMP was justiciable because "it is only a matter of time before the management plans are implemented and affect the Sierra Club's interests." *Marita*, 46 F.3d at 613. *Amici* agree with the Seventh Circuit that a case can be ripe for review even when the "direct effect" on the plaintiff is somewhat distant in time, so long as there are very strong reasons to believe that the

plaintiff will eventually be affected. However, given the Forest Service's willingness to consider anew all relevant issues in connection with proposals for site-specific activities in the Wayne National Forest, there is no basis for asserting that "it is only a matter of time" before plans outlined in the Wayne Forest Plan are to be implemented and affect Respondents' interests. Accordingly, because *Marita* is based on factual premises inapplicable to the instant case, it provides no support for Respondents' position.

The Sierra Club asserts that ripeness concerns disappear once it can be shown that some logging operations have begun pursuant to an LRMP. Opp. Br. 13-14. That approach to ripeness was rejected by the Court in *NWF;* the Court held in *NWF* that broad-ranging attacks on an agency's general policies "cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members." *NWF*, 497 U.S. at 893. Clearly, challenges to any on-going (or imminent) site-specific logging operations in the Wayne National Forest would be ripe for review. But as *NWF* makes clear, the ripeness of one such challenge does not license those pressing the challenge to seek review of underlying policy determinations (such as the Wayne Forest Plan) that do not directly affect them. *Id.* at 894.

As noted in *NWF*, those seeking wholesale reform of government policy may be "understandably frustrated" by the slow pace of such a "case-by-case approach" to ripeness determinations and by having judicial review confined to those instances in which "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action

applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *NWF*, 497 U.S. at 891, 894. However, it is such limitations on judicial review that ensure that the federal courts do not entangle themselves in abstract policy debates that are properly the province of another branch of government.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse the judgment of the Sixth Circuit and find that Respondents' claims are not justiciable.

Respectfully submitted,

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